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Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1973

No. 73-648

MADELINE WOLFE,

Petitioner,

vs.

METROPOLITAN DADE COUNTY
and
ASHTON TYLER,

Respondent.

PETITIONER'S REPLY BRIEF

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Respondents offer only one ground challenging the issuance of the Petition, namely, whether this Appeal was timely filed. To support the timeliness of this Petition Petitioner shows unto this Honorable Court as follows:

1. This Court has consistently held that it is necessary for a Petitioner to exhaust his State remedies, including the taking of an Appeal or the filing of a Petition for Certiorari to a State Supreme Court from a state intermediate Appellate Court (Stratton v. Stratton, 239 U.S. 55, 36 S. Ct. 26, 60 L. Ed. 142). This rule is followed even when the jurisdiction of the state's final Court of Appeal is discretionary (Andrews v. Virginian R.Co., 248, U.S. 272, 39 S. Ct. 101, 63 L. Ed. 236), since it is

> ". . . the existence of the power, and not the considerations moving to its exercise (which is) the criterion by which to determine whether the judgment of the trial court was final. . ."
> (39 S. Ct. at 102).

In such cases, the time for filing a Petition for Certiorari in this court runs from the date when the jurisdiction of the state's highest court was refused (American Railway Express Co. v.

Levee, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140). In such a case the Writ is directed ultimately to the intermediate Court of Appeal. (Callendar v. State, 383 U.S. 270, 86 S. Ct. 924).

2. Florida's final Appellate Court is its Supreme Court and the decisions of the District Courts of Appeal may be reviewed, under certain circumstances, by the Supreme Court.

The United States Supreme Court asked the Florida Supreme Court to outline the finality of Florida's Appellate proecedures, pursuant to Rule 4.61, Florida Appellate Rules, in the case of Dressner, et al v. City of Tallahassee, 375 U.S. 136, 84 S. Ct. 235, 11 L. Ed. 2d, 208. In that case, an appeal from a Municipal Court to a Circuit Court was involved. The Florida Supreme Court affirmed that further review could be had by Certiorari to the District Courts of Appeal and then added (164 So. 2d at 212):

> [12, 13] We contribute an additional observation regarding a possible review of the decision of the Florida District Court of Appeal if its jurisdiction had been properly invoked in the instant case. Under Florida constitutional provisions a decision of the District Court of Appeal is reviewable on certiorari granted by the Florida Supreme Court in the event that such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District Court of Appeal. Such decision is reviewable by the Florida Supreme Court if it initially construes a con-

> trolling provision of the state or federal constitution or initially passes upon the validity of a state or federal statute or treaty. To this extent complete exhaustion of Florida's appellate processes would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court timely and properly invoked.

These procedures are authorized by Article V, Section 4 (2) of the Florida Constitution and by Florida Appellate Rule 2.1-A (5) (a) and (b) and Rule 4.5-c (6), the pertinent portions of which are reprinted herewith in the Appendix to this Reply.

3. In addition, Florida Law requires a Notice of Appeal and the record thereof to be regarded and acted on as a Petition for Certiorari duly presented to an Appellate Court when circumstances require.

Although some attorneys, out of an abundance of caution, will file both a Notice of Appeal and a Writ of Certiorari (Armstrong v. City of Tampa, 118 So. 2d 195), Florida Statutes 59.34 provides, and the courts consistently hold, that an appeal is sufficient by itself. However, the contrary is not true; a Petition for Certiorari may not be treated as a Notice of Appeal (Bartow Growers' Processing Corp. v. Florida Growers' Processing Coop., 71 So. 2d, 165).

Since the question of the construction of the United States and Florida constitution could not be presented to the Supreme Court by Certiorari (Engel v. City of North Miami, 115 So. 2d, 1) and the question of the conflict between the District Court decision and the case of Griggs v. Duke Power Co., 401 U.S. 424, 28 L. Ed 2d 158, 91 S. Ct. 849, could be reviewed by Certiorari or Certiorari treated as appeal, it was proper to file a Notice of Appeal from the District Courts to the Florida Supreme Court.

4. What constitutes "initially construing" a provision of the Florida or United States Constitution is not clear from the decisions of Florida's Supreme Court.

In Hightower v. Bigoney, 156 So. 2d 501, the Supreme Court held that the District Court of Appeal in 145 So. 2d, 505 construed that portion of Florida's Constitution authorizing a jury trial even though that opinion is based on an analysis of equity procedure and it does not mention the Constitution except in one mention of the Appellant's claim. Similarly, Holbein v. Rigot, 245 So. 2d 57, held that a District Court of Appeal "appears to have construed the full faith and credit provision of the United States Constitution (Sec. 1, Art. IV) in arriving at its

decision," while in the case of Milligan v. Wilson, 104 So. 2d 35, a similar attempt to enforce a foreign judgment was held not to involve construing the Constitution. See also Schermerhorn v. Local 1625 of Retail Clerks Int. Assn., 141 So. 2d 269; State v. Cappetta, 216 So. 2d, 749.

The action of the District Court in the case at bar was no different from the action of the District Courts in the cases where jurisdiction was accepted by the Florida Supreme Court. Therefore it was necessary for Petitioner to exhaust this remedy prior to filing the Petition for Certiorari to the United States Supreme Court.

Petitioner also calls to the attention of the Court, the case of Callendar v. State, 181 So. 2d 529, when the Florida Supreme Court attempted to evade the Mandate of the United States Supreme Court by claiming it was without jurisdiction to follow the Mandate since it had declined jurisdiction of the original Appeal. This Court directed its Writ to the District Court of Appeal, bypassing the Supreme Court, (383, U.S. 270, 86 S. Ct. 924).

CONCLUSION

A Petitioner must exhaust his State remedies before applying to this Court for a Writ of Certiorari. The State remedies include a request to the highest Appellate Court of the State to take jurisdiction, even though that jurisdiction may be discretionary. Petitioner followed this rule in the case at bar. The time for filing the Writ with this Court is measured by the date of the refusal of the Florida Supreme Court to take jurisdiction. Since this Petition was filed within ninety days of that decision, it is timely filed.

RESPECTFULLY SUBMITTED,

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APPENDIX

Florida Constitution, Article V, Section 4 (2)

(2) JURISDICTION. Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

APPENDIX

FLORIDA APPELLATE RULES
Rule 2.1 (5)

(5) **Jurisdiction of the Supreme Court**

(a) Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees passing directly upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal Constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory appeals, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

(b) Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute, a federal statute or treaty, or initially construing a controlling provision of the Florida or federal Constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law.

The Supreme Court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to trial courts when questions are involved upon which a direct appeal to the Supreme Court is allowed as a matter of right.

APPENDIX

FLORIDA APPELLATE RULES
Rule 2.1 (5)
(Cont'd)

(c) The Supreme Court or any justice thereof may issue writs of habeas corpus returnable before the Supreme Court or any justice thereof, or before a district court of appeal or any judge thereof or before any circuit judge.

(d) When the jurisdiction of an appellate court has been improvidently invoked, that court may of its own motion or on motion of either party to the cause enter an order transferring it to the court having jurisdiction. Five days' notice of such motion or proposed action shall be given to the other parties. Notices of appeal and other papers filed prior to the transfer shall have the same force and effect as if filed in the proper court and as of the time when filed in the court from which the transfer was made.

(e) The Supreme Court may on its own motion or on suggestion of one of the district courts of appeal issue all writs necessary or proper to the complete exercise of its jurisdiction.

APPENDIX

FLORIDA APPELLATE RULES
Rule 4.5 (6)

(6) **From District Court to Supreme Court.** Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision.